Office-Supreme Court, U.S.
FILED
ALEXANDER L. STEVAS,
CLERK

No. 82-512

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

JAMES A. STRAIN
Counsel of Record for Petitioner
BRYAN G. TABLER
STANLEY C. FICKLE
JOHN M. KYLE III
Barnes & Thornburg
1313 Merchants Bank Building
Indianapolis, Indiana 46204
(317) 638-1313

Of Counsel:
GREGORY A. TROXELL
Public Service Company of Indiana, Inc.
1000 E. Main Street
Plainfield, Indiana 46168
(317) 838-1245

TABLE OF CONTENTS

Page

I. EPA's Claimed Authority Selectively To Approve And Disapprove Portions Of A Voluntary SIP Revision Plainly Impairs The States' Continuing Authority To Revise Their Mix Of Emission Limitations And Permits Patent Evasion Of The Act's Procedural Safeguards 2

II. The State And Not EPA Is The Proper Judge Of Whether A Particular Portion Of A Voluntary SIP Revision Is An Integral And Substantive Part Of The State's Decision To Revise Its Mix Of Emission Limitations 6

III. EPA's Factual Misrepresentations And Legal Non-Sequiturs Should Not Adversely Influence This Court's Decision Whether To Accept This Case For Review 7

TABLE OF AUTHORITIES

I. *Table of Cases*

Page

Mountain States Legal Foundation v. *Costle*, 630 F.2d 754 (10th Cir. 1980) 9

Pacific Legal Foundation v. *Gorsuch*, 690 F.2d 725 (9th Cir. 1982) 9

Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975) 2,3,7,9

Union Electric Co. v. *EPA*, 427 U.S. 246 (1976) 3,7,8

II. *Other Authority*

42 U.S.C. § 7410(a)(2) (Supp. IV 1980) (Appendix at A-53) 4

42 U.S.C. § 7410(a)(3)(A) (Supp. IV 1980) (Appendix at A-56) 2,4

42 U.S.C. § 7410(c)(1) (Supp. IV 1980) (Appendix at A-59-60) 4,5

42 U.S.C. § 7607(d) (Supp. IV 1980) (Appendix at A-84-90) 4

47 Fed. Reg. 43, 378 (Oct. 1, 1982) 8

Brief For The United States, *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975) ... 9,10

Reply Memorandum for Petitioners, *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975) 9

Brief For Respondent, *Indiana & Michigan Electric Co.* v. *United States Environmental Protection Agency*, Seventh Circuit Court of Appeals No. 82-1733, and *Indianapolis Power & Light Company* v. *United States Environmental Protection Agency*, Seventh Circuit Court of Appeals No. 82-1738 6

No. 82-512

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

EPA's Brief in Opposition to the petition for certiorari dramatically illustrates why the decision of the Court of Appeals is both erroneous and deserving of review by this Court. Although EPA pays lip service to the principle that the States have "primary authority to choose their own 'mix of [emission] limitations' " under the Clean Air Act (Opp. Br.

at 8), the Agency does not so much as *mention* the principle actually involved in this case—that the States *also* retain *"continuing authority to revise"* their choices as to the mix. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975) (emphasis supplied). Nor does EPA discuss at all the effect of its claimed "partial approval" power upon the Act's "mechanism" for effectuating those "developing policy choices"—State submission of voluntary SIP revisions pursuant to 42 U.S.C. § 7410(a)(3)(A). *Train*, 421 U.S. at 80.

EPA's Brief makes crystal clear that the Agency recognizes *no* limitations upon its power to alter a State's voluntary SIP revision other than those that pertain to the Agency's approval of original SIPs. (Opp. Br. at 5, 8, 11.) That interpretation of the Agency's authority, upheld by the Court of Appeals, transforms the Act's "mechanism" for exercise of the State's authority into a decidedly risky adventure at best and at worst, as starkly illustrated by this case, a cruel joke.

I. EPA's Claimed Authority Selectively To Approve And Disapprove Portions Of A Voluntary SIP Revision Plainly Impairs The States' Continuing Authority To Revise Their Mix Of Emission Limitations And Permits Patent Evasion Of The Act's Procedural Safeguards.

Elementary logic as well as this Court's analysis in *Train* dictate that the State's "continuing authority" to revise its previously chosen means of achieving national air quality standards is not limited to the authority to *expand* the scope of existing state restrictions. If the State truly may choose to "develop [new] policy choices," that must mean that the State is free to relax or abolish existing restrictions while simultaneously adopting or expanding others, provided only that the revised mix as a whole remains adequate to achieve minimum national standards. So long as the decision below stands in affirmation of EPA's claimed "partial approval" authority, however, States may attempt voluntary revision only if they are willing to risk unknown and unpredictable EPA modifications of State submissions *and* immediate EPA enforcement of the remainder. In the process, the State is

denied any opportunity to choose to continue under its existing SIP rather than to accept EPA's version of its revision.

That is the result in this case. Indiana voluntarily proposed expanding the scope of 1972 APC-3 beyond "combustion installations" to all "equipment" and beyond "smoke" to all "visible emissions" on the one hand, while granting a 15-minute per day exemption to previously and newly covered sources on the other. (Pet. at 3-4.) EPA then "disapproved" the 15-minute exemption, but "approved" and immediately federally enforced the expansion to all equipment and all visible emissions. (*Id.* at 4-5.)

EPA portrays petitioner's argument that the decision below permits EPA to adopt "any bits and pieces of revisions which it likes and [to drop] those which it does not like" as a "gross mischaracterization." (Opp. Br. at 11.) But EPA plainly recognizes no limitation whatever upon its power to do exactly what petitioner argued (Pet. at 13-14.) Indeed, EPA urges that the decision of the Court of Appeals "holds that the Administrator's authority to approve revised SIPs"—making no distinction between voluntary revisions and those required to meet the standards of the Act—"coincides with his [sic] authority to approve initial SIPs. The Administrator must approve both if they meet the attainment and maintenance requirements of Section 110 .... The decision below does not alter this objective test." (Opp. BR. at 11)

"This objective test" is a polite way of saying that EPA may, at its option, sandbag any State that seeks voluntarily to revise its existing mix. Since the Act permits state rules more restrictive than required to meet minimum national standards, *Train*, 421 U.S. at 79, 98; *Union Electric Co.* v. *EPA*, 427 U.S. 246, 265 (1976), those portions of a voluntary SIP revision that *expand* the scope of existing restrictions will always be approved and enforced by EPA under its "objective test," whether or not the State would have chosen those increased restrictions had it known that its concomitant relaxation of other restrictions would be disapproved.

As petitioner originally argued, no statutory language authorizes and no statutory policy is served by permitting EPA to "partially approve" voluntary SIP revisions. (Pet. at 12-14.) By contrast, national air quality standards are preserved if EPA's authority is limited to the Act's express terms—to approve or disapprove "any revision," 42 U.S.C. § 7410(a)(3)(A)—because disapproval of a voluntary revision leaves in effect an existing adequate SIP previously chosen by the State.

Equally important, limiting EPA to approval or disapproval of a voluntary revision in its entirety leaves the State with the primary policy role that Congress conferred. If the State *wishes* to adopt EPA's version of a minimally adequate revision, the State is free to submit that version to EPA for the then-ministerial act of approval. If, on the other hand, the State would rather continue with the existing SIP instead of adopting the "approved" increased restrictions absent the "disapproved" relaxation of restrictions, the State may choose that option as well. That choice is plainly denied under the "partial approval" authority exercised here and upheld by the Court of Appeals. EPA neither rebuts petitioner's argument nor offers *any* justification for that unfettered authority.

Nor does EPA address petitioner's argument that exercise of this "partial approval" authority rips a gaping hole in the Act's stringent procedural requirements governing the promulgation of Federal regulations. (*See* Pet. at 18-20.)

The decision of the Court of Appeals upholds EPA's statutory exegesis which injects the words "or any portion thereof" into the section of the Act governing EPA approval of revisions, 42 U.S.C. § 7410(a)(3)(A), words that on the face of the Act apply only to EPA approval of original SIPs. 42 U.S.C. § 7410(a)(2). At the same time, that decision permits EPA wholly to evade the procedural safeguards the Agency *must* follow, 42 U.S.C. §§ 7410(c)(1), 7607(d), when it approves only a "portion" of a state submission under the section of the Act that actually contains those words. Of particular relevance to the circumstances presented here, those proce-

dures require, *inter alia*, public hearings in the affected State on EPA's proposed regulations and allowing the State a second opportunity to choose means of its own. (*See* Brief in Support of Petition For Certiorari of the Indiana Air Pollution Control Board as Amicus Curiae, at 7-9.)

Petitioner does not concede that EPA has any authority to promulgate federal regulations pursuant to 42 U.S.C. § 7410(c)(1) when it disapproves a voluntary revision. In that circumstance the State is still in compliance with the Act because the pre-existing and federally adequate SIP remains in effect. (Pet. at 12-13, 18.) But if petitioner is wrong and EPA can create new federal regulations by "approving" in part and "disapproving" in part a voluntarily-submitted revision—regulations of a form never, as here, submitted by the State nor subsequently adopted or enforced by the State—then *surely* the Agency cannot do so without following those procedures required in circumstances where the Act *expressly authorizes* creation of federal regulations.[1]

Understandably, the Agency would like to have it both ways. EPA wants its administrative *powers* over voluntary SIP revisions construed expansively and as co-extensive with its powers over original SIPs. (Opp. Br. at 5, 8, 11.) But EPA does not want any concomitant expansion of the correlative procedural *duties* that arise when it exercises the identical power with respect to original SIPs. The perverse result, affirmed by the Court of Appeals, is that EPA is permitted to evade in the *voluntary revision* situation, where the State has done nothing wrong, those procedural safeguards intended by Congress to protect the State in circumstances where the State has defaulted its obligations under the Act.

---

[1]Notably, EPA's version of the "Question Presented" states only one-half of the question. The question is not only whether EPA has statutory authority to "partially approve" a voluntary SIP revision, but also, if it does, whether such authority may be exercised without further administrative proceedings pursuant to the Act's procedural requirements. Having deleted this half of the Question Presented, EPA's Brief does not discuss it at all.

That is not only anomalous, but also cannot be countenanced under the principles of federalism Congress embodied in the Act.

II. The State And Not EPA Is The Proper Judge Of Whether A Particular Portion Of A Voluntary SIP Revision Is An Integral And Substantive Part Of The State's Decision To Revise Its Mix Of Emission Limitations.

Perhaps as camouflage for the issues it fails to address, EPA contends that the disapproved 15-minute exemption contained in Indiana's 1974 revision of APC-3 did not alter the State's pre-existing mix of emission limitations. (Opp. Br. at 9 n. 13, 11.) On its face, that contention is incredible—the same sentence of Indiana's proposed revision that so expanded the regulation's coverage also contained the exemption. (A-95.) Moreover, that contention ignores and denigrates the representations made to this Court by the Indiana Air Pollution Control Board. (Amicus Brief in Support, at 3-4.) Furthermore, EPA's verbal puffery cannot obscure what the State has made clear by deed as well as by word. Indiana has never adopted EPA's version of 1974 APC-3, has refused to enforce it, and has repeatedly sought to revise it by means more cooperative than the lawsuit EPA now faults the State for not bringing. (Opp. Br. at 11-12.)[2]

---

[2]Moreover, EPA's contention is contradicted by its own representation to the Seventh Circuit less than a week after filing its Brief in this Court:

> EPA's action [on 1974 APC-3] clearly made the SIP more stringent than it would have been had EPA approved the revision in its entirety.

Brief For Respondent at 21, *Indiana & Michigan Electric Co.* v *United States Environmental Protection Agency*, No. 82-1733, and *Indianapolis Power & Light Company* v. *United States Environmental Protection Agency*, No. 82-1738, currently pending before the Seventh Circuit.

Congress gave the States, not EPA, the "continuing authority" to make new policy choices with respect to the emission limitations mix. *Train*, 421 U.S. at 80, 87. Congress gave the States, not EPA, the authority to make the political and economic tradeoffs that are integral to any decision voluntarily to revise a SIP. *Union Electric*, 427 U.S. at 269.[3] Accordingly, only the State, and not EPA, can judge whether any particular provision of a voluntary revision is an indispensible part of the revised choice. There is neither statutory nor policy justification for allowing EPA to render *ad hoc* judgments with respect to that issue. When EPA disapproves any aspect of a voluntary revision, the State can and must be permitted to make that judgment for itself.

III. EPA's Factual Misrepresentations And Legal Non-Sequiturs Should Not Adversely Influence This Court's Decision Whether To Accept This Case For Review.

Petitioner recognizes that the Court's decision whether to accept a case for review is not likely to be influenced by counsels' quibbling over minor legal points or factual inferences with respect to the record. However, three assertions made by the Agency in its Brief in Opposition are both inaccurate and central to the issue presented for review.

First, contrary to EPA's representation (Opp. Br. at 9 n.12), there is no evidence in this record that any public hearing was held on EPA's federal version of 1974 APC-3. In fact, no such hearing was ever held. The only hearings held with respect

---

[3]The Act does not:

> permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution .... Congress plainly left with the States, so long as the national standards [are] met, the power to determine which sources [are to] be burdened by regulation and to what extent.

Union Electric, 427 U.S. at 269.

to 1974 APC-3 were on *Indiana's* fundamentally different regulation.[4] EPA's factual misstatement should not be permitted to obscure the significant point that the claimed administrative authority to edit a voluntary SIP revision, upheld by the Court of Appeals, permits evasion of the public hearing requirement every time EPA elects to exercise it.

Second, the implication that EPA is now surprised by Indiana's opposition to EPA's version of 1974 APC-3 (Opp. Br. at 11-12) is simply disingenuous. EPA has repeatedly observed that Indiana has not adopted or enforced EPA's version of 1974 APC-3. (*See* Pet. at 5.) Indeed, after the instant petition was filed, EPA again disapproved a Delayed Compliance Order issued by the State to Bethlehem Steel Corporation because that State Order "requires compliance with Indiana APC-3 as promulgated by Indiana" rather than "the APC-3 approved by EPA." 47 Fed. Reg. 43,378 (October 1, 1982). Furthermore, EPA's representation "that the State of Indiana did not object in 1975 to the Administrator's partial approval of the 1974 APC-3" is not only unaccompanied by any citation to the record (Opp. Br. at 11), it is wholly unsupported in this record and is flatly untrue. As EPA well knows, evidence EPA has agreed to place in the administrative record to be reviewed in *Bethlehem Steel Corp.* v. *Gorsuch,* No. 82-2884, currently pending before the Seventh

---

[4]The State Agency which promulgated Indiana's version of 1974 APC-3 considered the 15-minute exemption crucial to its technical and economic feasibility and therefore necessary to its validity as a matter of State law. (Amicus Br. in Support, at 4.)

In *Union Electric,* 427 U.S. at 266-267, this Court stressed that the "most important forum for consideration of claims of economic and technical feasibility" is the public hearing before the state agency, and that state courts are the only forums for judicial review of such claims. By proceeding as it did, EPA deprived petitioner and other affected persons of both forums. No public hearing on the technical and economic feasibility of EPA's edited version of 1974 APC-3 was ever held. Moveover, it is at best doubtful that a state court would have jurisdiction to review these issues because the State has never adopted EPA's version of the regulation. (Pet. at 15.)

Circuit, demonstrates that Indiana objected from the beginning to EPA's "partial approval" of 1974 APC-3.

Third, EPA's contention that petitioner has no "standing to argue that the rights of the State of Indiana have been violated" (Opp. Br. at 12) partakes more of farce than legal argument. EPA cites as authority cases denying standing to a public interest organization which shows no injury in fact to itself or its members.[5] How those cases are authority for denying standing to petitioner which is subject to the contested regulation and has been subjected to search warrants issued on the basis thereof (Pet. at 5-6) is not and cannot be explained. EPA has not and cannot articulate why petitioner is barred from arguing those policy reasons that lead Congress to withhold from EPA the federal administrative authority to which petitioner now finds itself illegally subjected. And if EPA knows, it does not tell this Court why the United States may argue the rights of the States, *see* Brief for the United States at 45, and Reply Memorandum for Petitioners at 3, *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, but a citizen of a State and a beneficiary of those statutory restrictions upon federal administrative authority may not.

This petition presents an opportunity to decide whether the Government's previous arguments to this Court regarding the revision section of, and State autonomy under, the Clean Air Act are promises to be fulfilled or empty litigation rhetoric to be invoked on EPA's expedient whim:

> The holding below . . . would result in unwarranted constriction of state autonomy to determine how the national standards should be attained and implemented

---

[5] In *Mountain States Legal Foundation* v. *Costle,* 630 F.2d 754 (10th Cir. 1980), the public interest organization not only failed to show injury in fact, its arguments with respect to the rights of the State were contrary to the arguments made by the State itself. In *Pacific Legal Foundation* v. *Gorsuch,* 690 F.2d 725 (9th Cir. 1982), the organization failed to show injury in fact in a case raising only the constitutional rights of the State.

within each state. In providing for national air quality standards, Congress plainly meant to establish national ends to be achieved. But it did not intend comparably to nationalize decision-making about the means for achieving those ends—decisions whose economic, social and political dimensions are of particular concern to the states and localities most immediately affected by them.

Brief for the Unites States at 45, *Train* v. *Natural Resources Defense Council*, 421 U.S. 60.

CONCLUSION

For the reasons set forth, the Petition for Certiorari should be granted and the decision of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

JAMES A. STRAIN
Counsel of Record for Petitioner
BRYAN G. TABLER
STANLEY C. FICKLE
JOHN M. KYLE III
Barnes & Thornburg
1313 Merchants Bank Building
INDIANAPOLIS, INDIANA
46204
(317) 638-1313

Of Counsel:
GREGORY A. TROXELL
Public Service Company of Indiana, Inc.
1000 E. Main Street
Plainfield, Indiana 46168
(317) 838-1345